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# UNITED STATES FEDERAL COMMUNICATIONS COMMISSION

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In Re Applications of: ) MM Docket No. 99-153  
)  
READING BROADCASTING, INC., ) File No.: BRCT-940407KF  
)  
For Renewal of License of )  
Station WTVE(TV), Channel 51, )  
Reading, Pennsylvania )  
)  
and )  
)  
ADAMS COMMUNICATIONS ) File No.: BPCT-940630KG  
CORPORATION )  
)  
For Construction Permit for )  
a New Television Station to )  
Operate on Channel 51, )  
Reading, Pennsylvania )

Volume: 6  
Pages: 208 through 360  
Place: Washington, D.C.  
Date: January 4, 2000

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## HERITAGE REPORTING CORPORATION

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Before the  
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Washington, D.C. 20554

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Reading, Pennsylvania	)	

Room TW-A-363  
FCC  
445 12th Street, N.W.  
Washington, D.C. 20554

Tuesday,  
January 4, 2000

The parties met, pursuant to the notice of the  
Judge, at 9:50 a.m.

BEFORE: HONORABLE RICHARD L. SIPPEL  
Administrative Law Judge

APPEARANCES:

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APPEARANCES: (Continued)

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E X H I B I T S

	<u>IDENTIFIED</u>	<u>RECEIVED</u>	<u>REJECTED</u>
<u>Reading:</u>			
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Adams:

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P R O C E E D I N G S

(9:50 a.m.)

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JUDGE SIPPEL: It's ten minutes of ten. There has been a delay because of some technical difficulties with the recording system.

This is our first session, admissions session. I'm going to ask counsel to note their appearances at this time.

On behalf of Reading?

MR. HUTTON: On behalf of Reading Broadcasting, Inc., Thomas Hutton, Randall Sifers, and our assistant, Jane Gilmore.

JUDGE SIPPEL: And on behalf of Adams?

MR. COLE: Gene Bechtel and Harry Cole.

JUDGE SIPPEL: And on behalf of the Bureau, the Enforcement Bureau?

MR. SHOOK: James Shook.

JUDGE SIPPEL: I want to just alert you at this time that tomorrow, January 5th, it being Wednesday, I am going to have to terminate the proceeding close to 4:00, just to give you some advance notice. That may become moot as we go through this today, but I have a previous engagement I can't change.

I have some preliminary matter here. First, there is a witness room that's available down here. It's Room

1 A-363, and it is open during court hours, and we can use it  
2 to consult with witnesses or the witnesses can make  
3 themselves as comfortable as they can.

4 I will be taking a midmorning break probably at  
5 about -- a little bit before 11:00. I do have some pending  
6 motions here I want to get into. But with respect to  
7 witnesses, does anybody expect to have sponsoring witnesses  
8 today?

9 (No response.)

10 JUDGE SIPPEL: None. All right. Does everybody  
11 feel comfortable that we can handle these documents without  
12 any witnesses?

13 (No response.)

14 JUDGE SIPPEL: No problem, hearing nothing. All  
15 right. I'm just taking account here. That's all I am  
16 doing.

17 There are motions by Reading, one is the  
18 opposition to the testimony of -- the cross-examination,  
19 rather, of Ms. Brenda Helregel. Helregel, is that the name?

20 MR. HUTTON: That sounds correct, Your Honor.

21 JUDGE SIPPEL: Brenda Helregel. All right, that  
22 has to do with a Reading exhibit that's a market report that  
23 was published by the National Broadcasting Association. I'm  
24 not going to wait until there is a further round of  
25 pleadings on this, but Mr. Bechtel or Mr. Cole, do you want

1 to address this?

2 MR. BECHTEL: Surely.

3 JUDGE SIPPEL: This is the motion on the -- you  
4 have noted for testimony, for cross-examination, Brenda K.  
5 Helregel, who was the author of a market report, a market-  
6 report type document, "In the Public Interest," which is  
7 part of Reading's exhibits as to which they wish official  
8 notice to be taken. I believe it's tab 6 of their Volume 9.

9 MR. BECHTEL: Let me put a packet before the Court  
10 and counsel and later on we'll address that.

11 JUDGE SIPPEL: Okay. Do we need to have this  
12 marked?

13 MR. BECHTEL: I don't think so, sir, unless you  
14 want it as an exhibit.

15 JUDGE SIPPEL: I see. No, these are points and  
16 authorities.

17 Well, you certainly have given me more than I can  
18 read in just a couple of minutes here on the bench. Do you  
19 want to outline what your position would be and then I can  
20 consider that in the context of these materials --

21 MR. BECHTEL: Absolutely.

22 JUDGE SIPPEL: -- and we'll come back to it later?

23 MR. BECHTEL: Yes, I'll be happy to do that.

24 My position is that under the rule cited by  
25 Reading Broadcasting Company, the cases require, in order to

1     rely on a survey study such as the one that they are using,  
2     require that the author of that study be available for  
3     cross-examination so that you can evaluate the weight to be  
4     given to the survey.

5             Once you have that person there as your -- so that  
6     you have that testimony from which the weight can be given,  
7     then the contents of the survey are admissible hearsay, and  
8     then you'll subscribe the weight. But you have to have the  
9     author there first for the cross-examination so that the  
10    weight can be evaluated. You just can't take it in. In  
11    other words, it has to be -- in order to be admissible  
12    hearsay, it has to have a sponsoring witness who wrote it.  
13    And that's what these case say, and that's our position.

14            JUDGE SIPPEL: You want to voir dire the witness,  
15    you want to voir dire the author before I --

16            MR. BECHTEL: Or cross-examine her, whatever.

17            JUDGE SIPPEL: -- make the ruling?

18            Well, how much cross-examination would you be  
19    suggesting that I --

20            MR. BECHTEL: As much as the document requires.

21            JUDGE SIPPEL: Well, I don't think I would be  
22    inclined to give you open-ended cross-examination.

23            MR. BECHTEL: I'm not being clever, sir. I really  
24    don't know. I suspect that this one would be perhaps 20 -  
25    30 minutes.



1 JUDGE SIPPEL: Mr. Hutton?

2 MR. HUTTON: Ms. Helregel is not associated with  
3 Reading Broadcasting, Inc., in any way. We came across her  
4 report in doing research on the renewal expectancy issue and  
5 have asked that you take official notice of it. Taking  
6 official notice of it, I think, does not require cross-  
7 examination of the witness.

8 You know, for instance, we have also asked for  
9 official notice to be taken of a trade publication, *The*  
10 *Cable Atlas*, and there is no identifiable author of that  
11 publication and so cross-examination would be impossible.  
12 So I disagree with the interpretation that cross-examination  
13 is necessary in order for official notice to be taken.

14 You know, official notice gets taken every day of  
15 filings in the Commission's own records. I don't know that  
16 there is any Commission authority saying that you need to  
17 have the person available for cross-examination to take  
18 special notice.

19 JUDGE SIPPEL: Well, I don't have too much problem  
20 with official notice when there's a -- you know, something  
21 that's in the agency files, which is -- in my experience  
22 anyway, that's the traditional usage of official notice,  
23 although there may be some other exceptions to that. But as  
24 a general rule, that's how it's been used.

25 This is going a bit beyond that because you do

1 have in this document -- as I've perused it anyway, it looks  
2 as if there are some value judgments that are being made  
3 with respect to data that was assembled under this person's  
4 supervision.

5 Is there some other way that you see it?

6 MR. HUTTON: Well, it's certainly -- like most  
7 surveys, it does contain some judgments that were made in  
8 compiling the data. I don't doubt that. If it would be  
9 helpful, I could probably point to a citation where this was  
10 submitted to the FCC in connection with a proceeding in the  
11 FCC's rulemaking efforts. If you want us to cite to that,  
12 we could do that.

13 JUDGE SIPPEL: Well, this is not a rulemaking.  
14 That would not really -- that would not really help. I  
15 mean, I'm sure that the information in there is of interest,  
16 and I know that there is an exception to the hearsay rule  
17 which permits market-type reports to come into evidence  
18 without cross-examination, without a sponsoring witness. But  
19 I have been handed these authorities by Mr. Bechtel, and I  
20 really -- I can't really go much further into this without  
21 reading his authorities. But I am trying to just test --  
22 I'm trying to get some preliminary insights up front here.

23 For what purpose would this evidence be offered?  
24 Exactly what is it that you are trying to prove with this  
25 evidence?

1           MR. HUTTON: Well, it was really only -- in the  
2   entire study, there is really only one point that I wanted  
3   to draw upon, and that is simply the point that the average  
4   television station that was analyzed runs about 22 public  
5   service announcements a week. And Reading's record during  
6   the renewal period far exceeds that, and I just wanted to  
7   make that point, that Reading went far above and beyond what  
8   was then considered the norm in providing public service  
9   announcements to the viewing public.

10           JUDGE SIPPEL: So that would be a very selective  
11   portion of the entire report.

12           MR. HUTTON: That's the only point I wanted to  
13   make.

14           JUDGE SIPPEL: And if it's only being offered for  
15   that point, then what would be the --

16           MR. BECHTEL: That doesn't help at all.

17           JUDGE SIPPEL: -- nature of your cross-  
18   examination?

19           MR. BECHTEL: That doesn't help at all, sir.  
20   There are other stuff in there that if it comes in, we want  
21   to use -- that is to say, the surveys of the public affairs  
22   programming that television stations have done. And in any  
23   event, until we know the nature of the sampling and the  
24   circumstances under which the survey was taken, we cannot  
25   evaluate whether that's a true depiction of the performance

1 of television stations throughout the country or in markets  
2 such as the size of Reading.

3 JUDGE SIPPEL: But isn't that exactly what that  
4 Exception 17(a) of 317 is designed do?

5 MR. BECHTEL: As interpreted by these cases, if  
6 you have the author there, yes. If you don't have the  
7 author there, no.

8 Compilations, that's something else.  
9 Compilations, TV fact book, a collection of the contour maps  
10 for *The Cable Atlas*, compilations are a different genre of  
11 these types of market studies.

12 But surveys -- I've given you the leading case  
13 that started it back in 1951 in the Bireley Orange Beverage  
14 case where they were studying people and their reactions to  
15 this orange juice which was different from other kinds of  
16 orange juice under the federal food and drug laws, and then  
17 two illustrative cases that Mr. Moore in his federal rules  
18 booklet cited, and all three of them required.

19 MR. HUTTON: Your Honor, if it would be helpful, I  
20 can point you to exactly the chart that I'm interested in,  
21 and that is -- on page 17 of the survey there's a chart that  
22 appears as Table 8.

23 MS. GILMORE: It's Exhibit 14.

24 JUDGE SIPPEL: This is in your volume for --

25 MR. HUTTON: Yes, it's Volume 11, Exhibit 14, I

1 believe.

2 JUDGE SIPPEL: "In the Public Interest." I have  
3 it. What page on there?

4 MR. HUTTON: Page 17.

5 JUDGE SIPPEL: And that would be it?

6 MR. HUTTON: That's it.

7 JUDGE SIPPEL: This table has the average value of  
8 PSA air time per station, average value per day.

9 MR. HUTTON: I'm not even interested in that, Your  
10 Honor. I'm interested in the first line, which is "average  
11 number of PSAs per day."

12 JUDGE SIPPEL: Oh, I see, I see.  
13 "Radio/television: 22." Twenty-two is the average. I see.  
14 That's what they represent the average to be.

15 That's all?

16 MR. HUTTON: That's it.

17 JUDGE SIPPEL: All right. And your position, Mr.  
18 Bechtel, is that I should not rely on that information  
19 without your ability to cross-examine this witness?

20 MR. BECHTEL: That's right.

21 JUDGE SIPPEL: Well, I'm going to read your  
22 materials, and we'll come back to this this afternoon.

23 MR. BECHTEL: Mr. Cole called my attention to -- I  
24 assented to the fact that we didn't have any witnesses here  
25 this morning. There is at least one situation where we

1 would require voir dire before we took our final position on  
2 a particular document, and I assume we could do that when  
3 the witness comes, because it's a witness who has been  
4 noted.

5 JUDGE SIPPEL: Yes, that will be fine. Whatever  
6 that document is, we'll just mark it for identification --

7 MR. BECHTEL: I do have voir dire on it.

8 JUDGE SIPPEL: No, that's fine. My question more  
9 or less anticipated that, but I just wanted to know if you  
10 were going to be dealing with these documents with the --  
11 well, you've made the point, and I'm in accord.

12 All right, the other -- these, again, these are  
13 all in the nature of preliminary matters, but the other  
14 preliminary matter I wanted to take up this morning was the  
15 opposition to the notices of Adams's depositions of public  
16 witnesses.

17 And you know, you've pointed out in your  
18 opposition papers, Mr. Hutton, that Adams's counsel did not  
19 comply with some specifics that I have laid out with respect  
20 to getting together with you -- your side and working out a  
21 schedule. Is that the reason you're opposed -- and you  
22 also, well, you also say that you don't -- you have not been  
23 pointed to the relevancy, I gather, of these, or the  
24 rebuttal relevancy of these witnesses' testimony would be  
25 your second point. Is that right?

1 MR. HUTTON: That's correct, Your Honor .

2 JUDGE SIPPEL: All right. Did either counsel want  
3 to address that?

4 MR. COLE: Yes, I would like to. I have a packet  
5 to put before the Court.

6 JUDGE SIPPEL: Thank you. Okay, and do you want  
7 to direct us to something in here?

8 MR. COLE: Yes, sir. With regard to the -- I want  
9 to make several points with regard to what I have just  
10 placed in front of you all, which is a copy of the listing  
11 of information that we received concerning the 20 public  
12 witnesses that Reading Broadcasting wish to present.

13 The first point I want to make is that, in terms  
14 of intelligence as to who they were and what their testimony  
15 would be, you will see that very little is given here, and  
16 in some instances what was given here was erroneous.  
17 Someone wasn't even a member of the organization that was  
18 cited.

19 The second thing I would say that of the number of  
20 people who are listed here, well over half were given --  
21 bear with me while I get --

22 JUDGE SIPPEL: Yes, sir.

23 (Pause.)

24 MR. COLE: There we go. At least a half were  
25 given a different time than we had scheduled them for. In

1 some instances, we made the change several times. In one  
2 instance, it was in a different city. One, two, three,  
3 four, five of the people on this list did not show or were  
4 not -- did not show or were cancelled. In two instances, we  
5 consented to substitutes. In one instance, it was a  
6 substitute for the same organization. I'm referring to the  
7 Burn Foundation, near the bottom of page 2. They told us it  
8 would be a Mr. Gage, and instead a Mr. Dillard was the  
9 witness. In another instance, it was a brand new  
10 organization altogether, the Boy Scouts, who sent two people  
11 over there.

12 And the point I'm getting at is that we may have  
13 technically missed that one date in terms of courtesy to  
14 counsel, but in this process there's been some "live and let  
15 live," and we have tried to approach these witnesses in that  
16 light. We could have had 10 witnesses. I suppose at the  
17 beginning we could have had 20 witnesses. We only have  
18 five. We very carefully picked them. One I happen to know  
19 a little bit about, he's the director of emergency planning  
20 and so on and so forth, and he has some thoughts about the  
21 inability of the station to broadcast programming regarding  
22 earthquakes and that sort of thing. So we've pinpointed  
23 five people that we think will get right at our theory of  
24 the case, which is that when they put their studios in  
25 mothballs and didn't have staff there available to function



1     like a television station rather than like a cable network,  
2     that they then disserved the community in the very ways that  
3     the NAB found. And let me get that thing back here for a  
4     moment.

5                     (Pause.)

6             MR. COLE: It will be just a moment, sir.

7             JUDGE SIPPEL: That's okay.

8                     (Pause.)

9             MR. COLE: If you look at the table of contents of  
10    the NAB document.

11            JUDGE SIPPEL: Is this the one you were just  
12    talking about before?

13            MR. COLE: The one we were talking about before.

14            JUDGE SIPPEL: Okay, that's proposed Exhibit 14 of  
15    Reading.

16            MR. COLE: That's correct. Yes, sir.

17            JUDGE SIPPEL: Okay.

18            MR. COLE: In the table of contents in -- one of  
19    the subjects of that survey is "Broadcasters are therefore  
20    disasters."

21            JUDGE SIPPEL: I see that. Or for emergencies and  
22    war.

23            MR. COLE: Emergencies and war. Well, I don't if  
24    they have war up there, but they sure as heck have an  
25    earthquake.

1           So in any event, these witnesses boil down, hone  
2   in on our basic theory of the case as to why renewal  
3   expectancy is not about all of these things he books and all  
4   of this glossy stuff funneled into their prestructured  
5   method of operation, which was, when we do have program time  
6   from the Home Shopping Network, we're going to try to sell  
7   it. We're going to sell it to religious people or whoever  
8   we can sell it to, but we're not going to go to the trouble  
9   of producing live programming where you can deal with issues  
10   in depth and chew up what little time the Home Shopping  
11   Network gives us on Sunday morning. We're going to squeeze  
12   it into these little inserts, and whatever we can do with  
13   that, that's fine, and we'll figure out a way why that fits  
14   into community needs, and then we will classify those very  
15   broadly as civic, children, and religion and whatever. And  
16   if that works, then any station can establish that it  
17   complies with the Commission's community needs programming  
18   policy. And that's not the law.

19           So I've digressed into a little sermon I shouldn't  
20   have, but the point is, those five witnesses are important  
21   to us. We accorded amenities and civilities to counsel for  
22   Reading Broadcasting, Inc., and we don't think that because  
23   we missed that one deadline, that we should have this  
24   Draconian ax chopped off on our five witnesses.

25           JUDGE SIPPEL: Mr. Hutton?

1           MR. HUTTON: Well, number one, it's a  
2       misrepresentation to claim that the studio was put into  
3       mothballs, and I want to dispel that right now. We've  
4       produced 11 volumes of exhibits. Ten of those, or nine of  
5       those volumes contain copies of the station's quarterly  
6       programs list and that documentation shows that the station  
7       did produce programming throughout the renewal period in  
8       question here. So this mothballs theory is malarkey.

9           Number two, we've heard about one witness who has  
10      allegedly some relevant information. That's one out of  
11      five. Out of the others, one was listed as holding an  
12      office but he didn't hold the office listed for him during  
13      the period in question. I would like -- I think we're  
14      entitled to some sort of showing as to why any of these  
15      people would be relevant. The number -- you know --

16           JUDGE SIPPEL: Well, isn't it -- I'm sorry, I  
17      didn't mean to interrupt. But he did give an illustration,  
18      in certain respects anyway, didn't he?

19           MR. HUTTON: Well, he offered an indication as to  
20      one of them. The other four remain a mystery.

21           The other point is simply that in September we  
22      were very much under the gun. We were under a heavy  
23      pleadings schedule. We were racing around trying to find  
24      people from several years back associated with different  
25      organizations. Most of them were associated with nonprofit

1 organizations, which go through a lot of turnover, a lot of  
2 staff attrition. And we did, I think, a credible job of  
3 providing relevant public witnesses to testify about the  
4 station's efforts during that period.

5 I think Adams was given substantially more time to  
6 provide a schedule, a list of rebuttal public witnesses.  
7 And as we pointed out in our pleading, they weren't able to  
8 meet the deadline.

9 JUDGE SIPPEL: Well, Mr. Bechtel has conceded the  
10 fact that they've missed a date.

11 Excuse me just a moment. We'll go off the record  
12 for a minute.

13 (Pause off the record.)

14 JUDGE SIPPEL: Back on the record.

15 He's narrowed it down to five witnesses. These  
16 would be, I take it, many in the nature of rebuttal  
17 witnesses, so in other words rebutting the positions, the  
18 public interest positions that I am assuming you're going to  
19 elicit or seek to elicit from your public witnesses.

20 MR. HUTTON: Well, we've completed our public  
21 witnesses.

22 JUDGE SIPPEL: I understand that. But a rebuttal  
23 witness is -- as a general proposition, you don't have to --  
24 you don't have to lay out in detail what a rebuttal witness  
25 is going to testify to. If they're going to bring witnesses

1 in as rebuttal witnesses and they don't add anything to  
2 their case, that's not going to sit well with the record.  
3 They have no interest in doing that. They have no interest  
4 in bringing five witnesses in to say nothing. And when they  
5 do try to testify -- well, of course, you can make your  
6 objections at their depositions, with respect to relevancy  
7 or with respect to their competency.

8 MR. HUTTON: I can but I don't feel like wasting  
9 another day up in Reading, you know, pursuing pointless  
10 witnesses.

11 I mean, I'll give you another example. Another  
12 one of these witnesses listed is a former employee of WTVE,  
13 and to the extent that he may be questioned about the  
14 station's programming record prior to the renewal term, I  
15 think that's clearly irrelevant, and I'm going to object to  
16 that. But why don't we face that issue now?

17 JUDGE SIPPEL: Well, I'll ask Mr. Bechtel. What  
18 about the witness that he -- the former employee?

19 MR. BECHTEL: Can I hand this off to Mr. Cole?

20 JUDGE SIPPEL: Sure.

21 MR. BECHTEL: He's the person that worked on the  
22 witness.

23 JUDGE SIPPEL: No, that's fine. That's fine.

24 MR. COLE: The witness who is the former employee,  
25 Your Honor, assisted in, as I understand it, constructing

1 the station and in its early years on the air; has been a  
2 long-term and continues to be a resident of the area; and  
3 because of his interest in the station has followed the  
4 station's progress over the years. Therefore, he provides  
5 not only the historical perspective of having seen the  
6 station in operation in the early rounds, but also of having  
7 observed the station and the Reading community and the  
8 Reading media market, including other television and related  
9 services over the period of time, including the license  
10 term. And I think he would provide very useful testimony  
11 concerning the station's history, including the license term  
12 in question, but also against the backdrop of --

13 JUDGE SIPPEL: Excuse me.

14 (Pause off the record.)

15 JUDGE SIPPEL: I'm sorry. We're back on the  
16 record.

17 MR. COLE: Thank you, Your Honor. I think I was  
18 in the process of pointing out that he would provide a very  
19 valuable perspective on the station's operation overall,  
20 including during the license term, against the backdrop of  
21 not only the station's previous history, but also the rest  
22 of the market.

23 JUDGE SIPPEL: So although he might not have  
24 firsthand knowledge from being employed at the station  
25 during the renewal period -- or was he?

1 MR. COLE: No, he was not.

2 JUDGE SIPPEL: He is a local resident in the area  
3 who has followed the progress of -- to the extent that he  
4 can he has followed the progress of the station?

5 MR. COLE: That's correct, Your Honor.

6 JUDGE SIPPEL: And as the former employee, that  
7 would give him some additional insights in terms of what he  
8 would be looking for or listening for or listening to -- I'm  
9 following my thought out loud here.

10 Now, what's the problem with that, Mr. Hutton? I  
11 mean, I know we're into weight. We're into all kinds of  
12 arguments about how much I should pay attention to this  
13 testimony, but it certainly seems to be in the ballpark of  
14 relevant testimony for the purposes of a public witness.

15 MR. HUTTON: Well, I would concede that if the  
16 area of questioning is going to be the license term, but I  
17 think Mr. Cole has indicated that he intends to go beyond  
18 the license term because he says, "including the license  
19 term." And you know, we've been through a long battle over  
20 what the relevant period is in this case, and I thought we  
21 were all in agreement that it was the license term. And now  
22 we're hearing that Mr. Cole wants to expand upon it, and I  
23 don't think that's appropriate.

24 JUDGE SIPPEL: Well, there are two types of  
25 information with respect to that kind of a witness. One